NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1384-21

CHRISTA ROBEY and MAUREEN REYNOLDS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

SPARC GROUP LLC,

Defendant-Respondent.

APPROVED FOR PUBLICATION

February 9, 2023

APPELLATE DIVISION

Argued December 20, 2022 – Decided February 9, 2023

Before Judges Geiger,[1] Berdote Byrne and Fisher (Judge Berdote Byrne, concurring).

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3772-21.

Stephen P. DeNittis argued the cause for appellants (DeNittis Osefchen Prince, PC, attorneys; Stephen P. DeNittis, Joseph A. Osefchen, and Shane T. Prince, on the briefs).

Meegan B. Brooks (Steptoe & Johnson LLP) of the California bar, admitted pro hac vice, argued the cause for respondent (Sills Cummis & Gross P.C., Meegan B.

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[1] Judge Geiger did not participate at oral argument but joins the opinion with counsel's consent.

Brooks, Stephanie A. Sheridan (Steptoe & Johnson LLP) of the California bar, admitted pro hac vice, and Anthony J. Anscombe (Steptoe & Johnson LLP) of the California bar, admitted pro hac vice, attorneys; Charles J. Falletta and Michael S. Carucci, of counsel; Jeffrey J. Greenbaum, of counsel and on the brief; Meegan B. Brooks, Stephanie A. Sheridan, and Anthony J. Anscombe, on the brief).

PER CURIAM

In their complaint, plaintiffs alleged that defendant SPARC Group LLC, falsely advertised clothing at two of its Aeropostale stores as being discounted when, in fact, according to plaintiffs, the clothing had never been sold in those stores at a higher price. Plaintiffs asserted that this "markup to markdown" practice constitutes a violation of both the Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, and the Truth in Consumer Contract, Warranty, and Notice Act (the Truth Act), N.J.S.A. 56:12-14 to -18, and they alleged other common-law claims. The trial judge dismissed the complaint for failure to state a claim upon which relief can be granted. Although the judge thoroughly addressed all the statutory and common-law counts, her decision largely rests on a determination that plaintiffs failed to allege an ascertainable loss. We disagree and reverse.

I

In their complaint, plaintiffs detailed defendant's alleged "markup to markdown" practice. For example, they claim that, on March 4, 2021, plaintiff

Christa Robey purchased at defendant's Cherry Hill store a hoodie advertised as being 60% off an original price of $59.95, and three t-shirts advertised as "buy one get two free." On March 7, 2020, plaintiff Maureen Reynolds purchased at defendant's Paramus store a pair of pants advertised as being 50% off their original price of $36.50. Plaintiffs allege these items were never available at higher prices, thereby rendering illusory the offered discounts.

The trial judge granted defendant's Rule 4:6-2(e) motion to dismiss, and plaintiffs appeal, arguing, among other things, that they had adequately pleaded an illegal, fraudulent or wrongful practice under both the Consumer Fraud Act and the Truth Act, and that the judge erred by: appearing to expect that plaintiffs were required to prove the truth of their allegations to defeat the motion; failing to recognize that plaintiffs had pleaded an ascertainable loss that could sustain their Consumer Fraud Act claim; concluding that plaintiffs did not allege they are aggrieved consumers within the meaning of the Truth Act; and finding plaintiffs failed to adequately allege a breach of express warranty claim or their other common-law claims.

II

Our standard of review is de novo. Plaintiffs were not required to prove the truth of their allegations. Woodmont Properties LLC v. Westampton Twp.,

470 N.J. Super. 534, 540 (App. Div. 2022). Indeed, Rule 4:6-2(e) poses a very low bar for pleaders to hurdle. In ruling on such a motion, a trial judge must not only assume the truth of the allegations but also give the pleader the benefit of all reasonable factual inferences. Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). In deciding such a motion, a trial judge must search the challenged pleading "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). And "when the legal basis for the claim emanates from a new or evolving legal doctrine, even greater hesitancy is warranted" and counsels against dismissal. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002).[2]

[2] So great is the policy that favors disposition of cases on their merits rather than on inadequate pleadings, that a Rule 4:6-2(e) dismissal usually connotes a dismissal without prejudice that allows the pleader to amend. Printing Mart, 116 N.J. at 746 (quoted with approval in Baskin v. P.C. Richard & Son, 246 N.J. 157, 171 (2021)). The trial judge entered an order that stated the complaint was dismissed, without expressing whether the dismissal was with or without prejudice; the judge also specifically invoked Rule 4:6-2(e), thereby suggesting the dismissal may have been without prejudice. But the judge's order did not provide a deadline for the filing of an amended complaint, prompting us to assume – as further suggested by the grounds provided for dismissal – that the

III

In considering whether plaintiffs adequately pleaded a violation of the Consumer Fraud Act, we note the broad concepts embodied in N.J.S.A. 56:8-2, which prohibits the use of "unconscionable or abusive" commercial practices, as well as "deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with intent that others rely . . . ." By regulation, it has also been declared that the "[u]se of a fictitious former price," as alleged here, constitutes a violation of the Consumer Fraud Act. N.J.A.C. 13:45A-9.6(a). We understand this regulation as barring a merchant from, for example, changing an item's $50 price tag to $100 while offering a 50% discount. This is a deceptive practice prohibited by the Consumer Fraud Act and N.J.A.C. 13:45A-9.6(a), as well as federal law, 16 CFR § 233.1.

We are satisfied that plaintiffs' allegations that the discounts offered were illusory, as in our simpler example, were adequately pleaded. Plaintiffs claimed,

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judge intended a dismissal with prejudice. For that reason, we reject defendant's argument that the order under review is not final. Moreover, even if we could interpret the dismissal order as being merely interlocutory, since the appeal has now been fully briefed and argued, we would consider this to be one of those "extraordinary circumstances" that warrants granting leave to appeal out of time. Caggiano v. Fontoura, 354 N.J. Super. 111, 124 (App. Div. 2002).

through the details provided about their purchases briefly summarized above, that each item purchased was "never offered . . . at [its] purported regular price . . . either before or after [plaintiff's] purchase" and, thus, defendant utilized a fictitious price, as well as the come-on of a discount, as the means of hoodwinking its customers. Plaintiffs' Consumer Fraud Act claim contains both the particulars required by Rule 4:5-2 and the fundament of a claimed violation of that Act. In the same way, the allegations are adequate to support plaintiffs' claim under the Truth Act. We, thus, reject defendant's argument, endorsed by the trial judge – in her reliance on a similar federal district court matter, see Robey v. PVH Corp., 495 F. Supp. 3d 311 (S.D.N.Y. 2020), which, in our view, mistakenly interpreted New Jersey law – that plaintiffs failed to plead that defendant engaged in conduct violative of either the Consumer Fraud Act or the Truth Act.[3] Whether plaintiffs can ultimately prove their allegations, of course, is not before us.

[3] The Truth Act is violated whenever a seller offers any "consumer warranty, notice or sign" containing "any provision that violates any clearly established legal right of a consumer or responsibility of a seller . . . as established by State or Federal law." N.J.S.A. 56:12-15. Plaintiffs' allegations of illusory discounts and misleading price tags states a claim under the Truth Act. As we have also observed, the alleged deceptive practice violates N.J.A.C. 13:45A-9.6(a) and 16 CFR § 233.1, as well.

The more difficult question posed is whether plaintiffs pleaded either that they sustained an ascertainable loss under the Consumer Fraud Act or that they are aggrieved consumers under the Truth Act. Starting with the former, we note that the Consumer Fraud Act once authorized suits only by the Attorney General but was later amended to allow private causes of action for violations. N.J.S.A. 56:8-19. By way of these amendments, the Legislature imposed on private plaintiffs the obligation to establish a defendant's prohibited conduct, an ascertainable loss, and a causal relationship between the two. Zaman v. Felton, 219 N.J. 199, 222 (2014).

In construing the meaning of "ascertainable loss," the Supreme Court has held that the loss must be "quantifiable or measurable," Thiedemann v. Mercedes-Benz U.S.A., LLC, 183 N.J. 234, 252 (2005), not "hypothetical or illusory," D'Agostino v. Maldonado, 216 N.J. 168, 185 (2013). On the other hand, the Truth Act requires that a plaintiff be an "aggrieved consumer," which is defined as someone who has suffered an adverse consequence but not necessarily harm that may give rise to an award of damages. Spade v. Select Comfort Corp., 232 N.J. 504, 522-23 (2018). Although it is not clear to us whether the Supreme Court views the Consumer Fraud Act's ascertainable-loss requirement as the equivalent of the Truth Act's aggrieved-consumer

requirement, we are satisfied plaintiffs sufficiently pleaded both. If anything, the aggrieved-consumer requirement would appear to be broader, so that an adequate allegation of an ascertainable loss would be sufficient to allege that the plaintiffs are aggrieved consumers.

N.J.S.A. 56:8-19 defines an ascertainable loss as that which involves the "loss of moneys or property, real or personal." We are satisfied that plaintiffs have alleged such a loss by pleading, in essence, that they received no value for the offered discount; that is something real and quantifiable. Defendant's argument seems to be that plaintiffs have not alleged an ascertainable loss because, even accepting the allegations as true, they bought – using our simpler example – $50 items for $50. This argument, however, completely ignores that part of the exchange of promises included defendant's offers of discounts, and plaintiffs claim they received no benefit from the discounts.

Our holding that the loss of the discounts constitutes ascertainable losses is consistent with how the Supreme Court views the Consumer Fraud Act's ascertainable-loss requirement. In Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 13-14 (2004), the Court held that in a Consumer Fraud Act, courts must look to what would be available to the plaintiff in "an ordinary breach-of-contract case," namely, "the benefit of the bargain," in determining whether there is an

ascertainable loss. One of the alleged elements of the parties' bargain here was the value of discounts that defendant offered and plaintiffs accepted but that, in fact, had no value. We agree that these quantifiable amounts constitute sufficient allegations of ascertainable losses under the Consumer Fraud Act.

We have already observed that the alleged wrongful act, if proven, constitutes a violation of both the Consumer Fraud Act and the Truth Act, and we now hold that the alleged illusion of a discount is an ascertainable loss. This is essentially the same type of monetary loss found sufficient in Furst even if the facts and allegations aren't precisely the same.

Defendant argues that we should not read so much into Furst, or that perhaps we should assume the Court silently overruled Furst[4] when, less than a year later, it decided Thiedemann. We disagree in both respects. Indeed, we find Furst and Thiedemann in harmony. Furst expressed the general rule that an ascertainable loss may arise from the consumer's loss of the benefit of the bargain. Thiedemann dealt only with the narrower question of whether there can be an ascertainable loss when part of the bargain included the merchant's

[4] Defendant may not have quite said this, but it repeatedly pointed out in its forceful written and oral submissions that Thiedemann was decided after Furst as the means of suggesting that the former lessened (or eliminated) the significance of the latter.

promise to replace defective parts and a part found defective was timely replaced; in that instance, the Court concluded the consumer had not suffered an ascertainable loss because the consumer continued to receive the benefit of the bargain through the merchant's compliance with an express warranty. 183 N.J. at 251; see also Perkins v. DaimlerChrysler Corp., 383 N.J. Super. 99 (App. Div. 2006). The narrow question resolved by Thiedemann did not somehow undo Furst's general rule that an ascertainable loss may be found through a determination of whether the consumer suffered a loss of the benefit of the bargain. For the same reasons, plaintiffs sufficiently alleged they are aggrieved consumers under the Truth Act. So, we conclude the judge's holdings that plaintiffs failed to state claims upon which relief may be granted under either the Consumer Fraud Act or the Truth Act are erroneous.

IV

The judge also erred in finding that plaintiffs failed to adequately plead claims based on breaches of the implied covenant of good faith and fair dealing, the contract, and an express warranty, and in concluding that plaintiffs were not entitled to either a judgment declaring that defendant's alleged practices are deceptive or entry of injunctive relief.

First, in dismissing plaintiff's claim that defendant breached the implied covenant of good faith and fair dealing, the judge held that "just as the plaintiff[s] ha[ve] failed to plead facts sufficient to demonstrate that [they were] denied the benefit[s] of the bargain[s] promised, the plaintiff[s] also do[] not plead facts sufficient to demonstrate that the defendant acted with bad faith to deprive [them] of the enjoyment of the[ir] contract[s]" (quoting Robey, 495 F. Supp. 3d at 324). Since we have already determined that plaintiffs did plead sufficient facts to demonstrate a denial of the benefit of the bargain, the premise for the judge's holding on this count evaporates.

Second, the judge dismissed plaintiffs' claims based on alleged breaches of contract and an express warranty by again relying on her mistaken conclusion that plaintiffs had not sufficiently pleaded a deprivation of their benefit of the bargains they struck. For the same reasons, we conclude that the judge erred in this regard.

Third, the judge mistakenly held that plaintiffs did not adequately plead a claim based on the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62. Much of the judge's rationale is based, once again, on the mistaken notion that plaintiffs failed to adequately plead their substantive claims as the means for dismissing this derivative claim. But the judge's dispatching of the declaratory-

judgment claim also failed to account for the Legislature's direction that the Declaratory Judgment Act be "liberally construed and administered." N.J.S.A. 2A:16-51; see also In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 275 (2017).

Fourth, we reject the judge's determination that plaintiffs did not adequately plead sufficient facts upon which to base a claim for injunctive relief. The Supreme Court has recognized that consumers who bring private causes of action under the Consumer Fraud Act should be viewed as "private attorneys general," Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 268 (1997), and, as such, are entitled to seek relief not only on their own behalf but on the behalf of others, Laufer v. U.S. Life Ins. Co., 385 N.J. Super. 172, 185 (App. Div. 2006). For that reason, the judge's determination that plaintiffs aren't entitled to injunctive relief because they are already aware of defendant's allegedly deceptive practices and may, therefore, avoid them, is shortsighted about how the Legislature has empowered private plaintiffs in Consumer Fraud Act matters to obtain relief for the benefit of others.

Private plaintiffs in Consumer Fraud Act matters may seek all the relief permitted by N.J.S.A. 56:8-19, which not only permits treble damages and attorneys' fees but also "any other appropriate legal or equitable relief," which

would include the right to pursue injunctive relief to ban any fraudulent or deceptive practices. Indeed, the Supreme Court has recognized that although private plaintiffs must allege an ascertainable loss, they need not "ultimately prove an ascertainable loss in order to obtain injunctive relief" because, to require otherwise, would impose "too difficult a standard and would deter, rather than encourage, private causes of action, in contravention of the legislative scheme." Weinberg v. Sprint Corp., 173 N.J. 233, 251 (2002). Plaintiffs' allegations meet these requirements and, therefore, the judge erred in dismissing their claims for injunctive relief.

V

In the final analysis, we observe that the Consumer Fraud Act's prohibitions and rights were stated broadly and are to be "construed liberally in favor of consumers," Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994), for the purposes of "root[ing] out consumer fraud," Lemelledo, 150 N.J. at 264, and eradicating "fraudulent practices in the marketplace," Furst, 182 N.J. at 11; see also Dugan v. TGI Fridays, Inc., 231 N.J. 24, 50 (2017); Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 521 (2010). Our Supreme Court has recognized that the Consumer Fraud Act's history has been one of "constant expansion of consumer protection." Sun Chem. Corp. v. Fike Corp., 243 N.J. 319, 330 (2020) (quoting

Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997)). Although not considered in our courts' prior decisions, we conclude that the fundament of plaintiffs' complaint – that defendant marked up its prices and then marked them down with illusory discounts – is just one more type of deceptive practice made unlawful by the Consumer Fraud Act and is redressable, as well, through the other causes of actions they have pleaded. Today's decision is guided by these principles as well as the standard that governs the disposition of Rule 4:6-2(e) motions.

Reversed.

BERDOTE BYRNE, J.S.C. (temporarily assigned), concurring.

I join my colleagues in reversing and remanding because I agree plaintiffs have adequately pleaded a deceptive practice pursuant to the Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, and the Truth in Consumer Contract, Warranty, and Notice Act, N.J.S.A. 56:12-14 to -18, and have adequately pleaded ascertainable loss. I part company with my colleagues as to the type of ascertainable loss available to plaintiffs.

Ascertainable loss exists when loss is "measurable" even when precise amounts may not be known, and a court is not concerned with the truth or falsity of the pleadings at the motion to dismiss stage. See Perkins v. DaimlerChrysler Corp., 383 N.J. Super. 99, 110-11 (App. Div. 2006). The Supreme Court has described the element of ascertainable loss as sounding in a theory of contract damages. See Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 11 (2004). The Supreme Court has also recognized different methods of measuring ascertainable loss, including out-of-pocket losses and benefit of the bargain losses. See Thiedemann v. Mercedes-Benz U.S.A., L.L.C., 183 N.J. 234, 248, 252 n.8 (2005).

We have conceptualized the "benefit of the bargain rule" as allowing "recovery for the difference between price paid and the value of the property

had the representations made been true" and observed the "out-of-pocket" approach "provides recovery for the difference between the price paid and the actual value of property acquired." Romano v. Galaxy Toyota, 399 N.J. Super. 470, 483 (App. Div. 2008) (citations omitted). Typically, the touchstone within this framework is to place the victim in the same position as if the underlying contract had been performed. D'Agostino v. Maldonado, 216 N.J. 168, 194 (2013).

Although the Supreme Court has endorsed the benefit of the bargain theory of damages to discern ascertainable loss, it has not done so in this context where the contract has been performed and plaintiffs allege no facts about receiving non-conforming or defective goods. See, e.g., Thiedemann, 183 N.J. at 252 n.8 (citations omitted) (discussing plaintiffs who received something "less than" or non-conforming to reasonable expectations). There is no allegation of an overcharge alleged in the present appeal, nor have plaintiffs received something different than they reasonably expected.

I depart from my colleagues on this narrow issue: the pleadings here do not indicate plaintiffs were deprived of any benefit of the bargain. One plaintiff, Robey, viewed a hooded sweater with a price tag of $59.95. A sixty percent discount was advertised and applied at checkout, and Robey paid $23.98. Robey

also purchased three t-shirts, one with a price tag of $29.95, and two priced at $24.95. As part of the "buy one get two free" promotion, Robey purchased one t-shirt and received all three for $29.95. Reynolds similarly selected a pair of jeans listed for $36.50 which she purchased for half that price, $18.25. Both plaintiffs received the items they wanted for the advertised price which they agreed to pay at the point of sale. The hooded sweater, t-shirts, and jeans were not alleged to be defective, the wrong item, wrong color, or wrong size, nor did either plaintiff attempt to return them, unlike the plaintiff in Furst, 182 N.J. at 8-9.

Accepting plaintiffs' allegations as true, "plaintiffs suffered an ascertainable loss and monetary damages because they would not have purchased the items . . . had they known the items had not been regularly offered at the higher list price." If plaintiffs are able to prove a deceptive practice, their ascertainable loss is limited to their out-of-pocket losses if a jury believes they would not have purchased the merchandise but for the fictitiously advertised higher price. If they cannot prove that, they may be entitled to attorney's fees but not treble damages. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994); see also Romano, 399 N.J. Super. at 484 ("Even though plaintiff unsuccessfully proved the existence of an ascertainable loss, and was unable to recover treble

damages, plaintiff can recover reasonable attorney's fees and costs because defendant committed an unlawful practice.").

I do not suggest plaintiffs were required to request a pre-suit refund, as that is contrary to our Supreme Court's previous holdings. See Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 559-560 (2009). However, their expectation interest, and the loss of value to them, was the purchase price of the items; the quantum of loss to restore plaintiffs to their economic position prior to the litigation should therefore be properly measured by their out-of-pocket losses. D'Agostino, 216 N.J. at 194.

Here plaintiffs purchased the items for a price they agreed to at the point of sale, kept, and enjoyed those items. They do not have the right to receive the difference between their out-of-pocket costs and the fictitiously advertised price. Having alleged and proven the items were never worth the higher fictitiously advertised price, that inflated price cannot serve to establish the value of the benefit of their bargain. The allegations here do not rise to a bait and switch, an advertised but unavailable product, inherent defect, or wrong item. The goods conformed with every expectation but for the fictitious higher price.

The salutary purposes of the Consumer Fraud Act are sufficiently achieved by trebling the out-of-pocket damages and awarding attorney's fees and costs. Those damages consist of the price plaintiffs paid for the articles of clothing, potentially trebled. To calculate damages as the difference between the artificially inflated price less out-of-pocket losses would put plaintiffs in a significantly better economic position than they would have been in this situation, which is antithetical to our conceptual and contractual framework. D'Agostino, 216 N.J. at 194; Furst, 182 N.J. at 11-13. By limiting the measure of damages to out-of-pocket losses, plaintiffs will be placed in the same economic position they were prior to litigation.

In sum, the pleadings before us do not constitute an ascertainable loss measured by our benefit of the bargain metric. Plaintiffs may recoup treble their out-of-pocket losses if they can prove a deceptive practice not protected by the N.J.A.C. 13:45A-9.6(b) safe harbor provisions.[1] I would remand and instruct the trial court to allow ascertainable loss limited to out-of-pocket losses.

[1] I also note the trial judge dismissed the action after improperly shifting the burden of the safe harbor provisions of N.J.A.C. 13:45A-9.6(b) to plaintiffs. The history of the regulation indicates N.J.A.C. 13:45A-9.6(b) was drafted as a means for defendants to rebut the allegation of a former fictitious price, not as a pleading requirement for prospective plaintiffs. See 28 N.J.R. 1186(a). ("N.J.A.C. 13:45A-9.6(b) delineates the methods by which an advertiser can

substantiate that a former or comparable price is not fictitious."). The trial court improperly charged plaintiffs with the burden of disproving defendant fell within one of the enunciated safe harbor provisions in N.J.A.C. 13:45A-9.6(b) in order to withstand a motion to dismiss.